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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE

FILED

2004 NOV 22 A 9:46

U.S. DISTRICT COURT  
EASTERN DIST TENN

BY \_\_\_\_\_ CLERK

EARL PESTERFIELD, JR.

§

Plaintiff,

§

§

§

vs.

§

Civil Action No. 3:00-CV-104

§

SUNBEAM CORPORATION, and  
SUNBEAM PRODUCTS, INC., and  
WAL-MART STORES EAST, INC.,

§

JURY DEMANDED

§

§

§

Defendants.

§

**PLAINTIFF'S MOTION FOR PRELIMINARY DETERMINATION  
CONCERNING USE OF DEPOSITIONS AND TRIAL TESTIMONY  
TAKEN IN OTHER CASES**

Plaintiff, through counsel, respectfully tenders Plaintiff's Motion for Preliminary Determination Concerning Use of Depositions and Trial Testimony Taken in Other Cases.

AS GROUNDS THEREFOR, plaintiff states as follows:

1. This products liability case arises out of a fire which occurred on February 20, 1999 on the premises of Plaintiff's home at 809 Ridge Trail Road, Kingston, Roane County, Tennessee.

2. It is claimed that the fire was caused by a design defect in the safety circuit of a PTC technology Sunbeam electrically heated bedding product designed, manufactured, and distributed by Sunbeam Products, Inc. ("Sunbeam").

3. This case is one of numerous such cases resolved or pending around the country involving fire risks associated with this particular safety circuit in Sunbeam's PTC electrically heated bedding products, with many of these cases having common plaintiffs' counsel, McDermott, Hansen and McLaughlin, LLP, of Denver, Colorado, and common national defense counsel, Moffett & Dillon, P.C., out of Birmingham, Michigan.

4. A number of depositions have been taken concerning common liability issues in the collateral litigation that plaintiff wishes to use in this litigation.

5. Use of the depositions from collateral litigation is authorized under FED. R. CIV. PROC. 32(a), and FED. R. EVID. 804 and 801, and will save time, expense, and effort, and foster the mandates of FED. R. CIV. PROC. 1. No conceivable prejudice to Sunbeam is present, and requiring that all depositions be retaken in this case for use at trial serves no legitimate purpose.

6. Use of trial testimony from collateral litigation is authorized under FED. R. EVID. 804(b)(1), and will save time, expense, and effort, and foster the mandates of FED. R. CIV. PROC. 1. No conceivable prejudice to Sunbeam is present, and its requiring that all depositions be retaken in this case for use at trial serves no legitimate purpose.

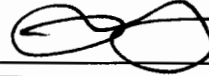
7. An early resolution of this issue will assist in determining the need for depositions for use at trial, and will minimize disputes and motions *in limine* during pretrial proceedings concerning admissibility.

8. Magistrate Judge Bostwick in the collateral cases of *Adams/Medford* and *Hildebrand/McCarver* pending in the United States District Court for Kansas has approved this approach and it is urged that this so-called "Kansas model" be adopted in this litigation.

An Affidavit of plaintiff's counsel in support of this Motion is attached to the accompanying Memorandum as Exhibit 1 and the prior depositions and trial testimony in question are contained on the CD Rom contained in the envelope attached hereto and incorporated herein by reference as Exhibit 2 and are referred to in Plaintiff's Memorandum in support of this Motion filed simultaneously herewith.

**WHEREFORE**, plaintiff prays that depositions taken in collateral cases and trial testimony described in the accompanying Memorandum be deemed useable in this case as if taken in this case, that the foundations for use under FED. R. CIV. PROC. 32(a) and FED. R. EVID. 804 and 801 be deemed satisfied, and for such other and further relief as the Court deems just and proper.

DATED this 18<sup>th</sup> day of November, 2004.



Thomas S. Scott, Jr., #1086  
Christopher T. Cain, #19997  
BALL & SCOTT  
550 W. Main Avenue, Suite 750  
Knoxville, TN 37902  
(865) 525-7028


**CO-COUNSEL:**

J. Polk Cooley, Esquire  
John D. Agee, Esquire  
COOLEY, COOLEY AND AGEE  
P.O. Box 730  
339 West Race Street  
Kingston, TN 37763  
(423) 376-9100

George E. McLaughlin, Trial Attorney  
**McDermott, Hansen & McLaughlin, LLP**  
Ohio Registration No. 0003932  
1890 Gaylord Street  
Denver, Colorado 80206-1211  
(303) 399-6037  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that I have forwarded a copy of the foregoing to DeWitt M. Shy, Jr., Les Jones, BURCH, PORTER & JOHNSON, 130 North Court Avenue, Memphis, TN 38103 and to Stephen T. Moffett, Thomas L. Vitu, MOFFETT & DILLON, P.C., 255 East Brown Street, Suite 340, Birmingham, MI 48009 and the United States District Court Clerk via U. S. Mail, postage prepaid this 18<sup>th</sup> day of November, 2004.

A handwritten signature in black ink, consisting of a stylized 'S' followed by a horizontal line, positioned above a solid horizontal line.

C:\Anita\Pesterfield\Motion for Prelim Determination of Other Case Depos.wpd